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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 vs.

11 PAUL WOMMER,

12 Defendant.
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Case No. 2:10-cr-00596-GMN-GWF

ORDER

**Defendant's Motion for Return of
Seized Property (#14)**

**Government's Motion to Dismiss
Defendant's Motion for Return of
Seized Property (#26)**

14 This matter is before the Court on Defendant Paul Wommer's Motion for Return of Seized
15 Property (#14), filed on June 29, 2011; the Government's Response to Motion for Return of Seized
16 Property (#22), filed on July 29, 2011; and Defendant's Reply to Government's Response to
17 Motion for Return of Seized Property (#23), filed on August 8, 2011. The Court scheduled a
18 hearing on the above motion on Monday, August 15, 2011. On Friday, August 12, 2011, however,
19 the Government filed its Motion to Dismiss Wommer's Motion for Return of Seized Property (#26)
20 on the ground that Defendant's motion is not ripe and the Court does not have jurisdiction to decide
21 it at this stage of the proceeding. The Court continued the hearing on Defendant's motion for
22 return of seized party to permit the issue of ripeness and jurisdiction to be fully briefed. Defendant
23 filed his Response to the Government's Motion to Dismiss Defendant's Motion for Return of
24 Seized Property (#29) on September 15, 2011. The Government filed its Reply on October 25,
25 2011.

26 **BACKGROUND**

27 Defendant Paul Wommer is an attorney-at-law. According to the superceding indictment,
28 between June 30 and July 8, 2010 Mr. Wommer made four withdrawals, each in the amount of
\$9,500.00, from his personal bank account at Nevada State Bank. On July 9, 2010, Mr. Wommer

1 withdrew another \$6,000.00 from that account. *Superceding Indictment* (#30), p. 2. On July 12,
2 2010, Mr. Wommer made two withdrawals each in the amount of \$9,500.00 from his Nevada State
3 Bank business account, "Wommer Law Offices, Incorporated." *Id.* p. 3. On July 13, 2010, Mr.
4 Wommer made an additional withdrawal of \$9,500.00 from the business account. *Id.* p. 2. The
5 total amount withdrawn by Mr. Wommer from these accounts was \$72,500.00.

6 Mr. Wommer provided the withdrawn funds to his part-time legal assistant, Angela
7 Lambelet, who deposited them in her personal account at Nevada State Bank. According to the
8 indictment, Ms. Lambelet made deposits of \$9,500.00 into her account on June 30, July 2, 7, 12, 13
9 and 14, 2010. She deposited \$9,200.00 into her account on July 15, 2010. *Superceding Indictment*
10 (#30), pp. 2-3. The total of the deposits charged in the indictment is \$66,200.00. The bank
11 reported Ms. Lambelet's deposits to the Internal Revenue Service ("IRS").

12 On August 6, 2010, United States Magistrate Judge Peggy Leen issued a Seizure Warrant
13 which authorized any special agent of the Internal Revenue Service Criminal Investigation to seize
14 the funds in Ms. Lambelet's Nevada State Bank checking account. The Government executed the
15 seizure warrant on August 9, 2010 and thereafter received an official check from Nevada State
16 Bank in the amount of \$75,700.62. *Government's Response to Motion for Return of Seized*
17 *Property* (#22), *Exhibit 2*.

18 On August 9, 2010, an IRS agent interviewed Ms. Lambelet who allegedly stated that she
19 deposited the funds into her account at Mr. Wommer's request. *See Government's Response to*
20 *Defendant's Motion to Dismiss* (#21), *Exhibit A, Memorandum of Interview*. Ms. Lambelet stated
21 that she had told Mr. Wommer that she would only deposit the funds into her account if she did not
22 have to pay tax on the funds and it was not illegal. Mr. Wommer assured her that if she deposited
23 less than \$10,000 on each occasion, she would not owe any tax and would not be in any trouble.
24 Ms. Lambelet stated that she was aware that Mr. Wommer had issues with the IRS and she was
25 aware that she was hiding his money from the IRS, but she did not know she was doing anything
26 illegal.

27 On August 11, 2010, the IRS agent interviewed Mr. Wommer who allegedly admitted that
28 all of the funds in Ms. Lambelet's personal bank account belonged to him. *See Government's*

1 *Response to Defendant's Motion to Dismiss (#21), Exhibit B, Memorandum of Interview* ¶ 1. Mr.
2 Wommer allegedly told the agent that in late 2009 or early 2010, he was advised by an IRS officer
3 that he had not filed personal or corporate income tax returns for the years 2007-2009. Mr.
4 Wommer immediately had his 2007 tax returns prepared and filed. His 2007 personal return
5 resulted in a \$28,000 tax due and owing. Mr. Wommer was also assessed an additional \$17,000 in
6 interest and penalties. Mr. Wommer paid the \$28,000 owed in taxes, but refused to pay the
7 \$17,000 in interest and penalties. He stated that he filed a request for a waiver of the interest and
8 penalties which the IRS denied, and that he filed an appeal from the denial of the waiver. The
9 \$17,000 in interest and penalties was partially offset by the refunds on his 2008 and 2009 tax
10 returns which the IRS applied to the interest and penalties. This left a balance of \$13,000 in
11 interest and penalties which Mr. Wommer was contesting. *Id.* ¶¶ 2-6.

12 Mr. Wommer also allegedly told the IRS agent that he had previously received an \$18,000
13 payment on a loan that he had made. The debtor then filed for bankruptcy and the bankruptcy
14 trustee sent a letter to Mr. Wommer requesting that the \$18,000 be turned over to the bankruptcy
15 court. Mr. Wommer allegedly told the IRS agent that he was concerned that the bankruptcy trustee
16 would levy on his bank accounts for the \$18,000. *Id.* ¶ 11. Finally, Mr. Wommer told the IRS
17 agent that he was concerned that his girlfriend, who resided in his house and had access to his bank
18 accounts, would drain his accounts. *Id.* ¶ 10.

19 Mr. Wommer indicated that all three of these issues factored in his decision to transfer his
20 funds into Ms. Lambelet's account. *Id.* ¶ 12. He stated, however, that he was mostly concerned
21 with the bankruptcy trustee's potential levy over the issues with his girlfriend or the IRS. *Id.* Mr.
22 Wommer also allegedly admitted that he knew what structuring is and that he had prosecuted
23 several structuring cases during his time as an Assistant United States Attorney in Nevada in the
24 1990's. *Id.* ¶17. He stated that he set up the transactions in amounts less than \$10,000 to avoid the
25 cash transaction reporting (CTR) requirements. *Id.* ¶ 18.

26 There is apparently no dispute that the entire \$75,700.62 seized from Ms. Lambelet's
27 checking account belonged to Defendant Wommer. The withdrawals from Mr. Wommer's bank
28 accounts as charged in the indictment, however, total only \$72,500.00. The deposits into Ms.

1 Lambelet's checking account charged in the indictment total only \$66,200.00. Another \$9,500.00
2 of Mr. Wommer's funds were therefore deposited into Ms. Lambelet's account—although this
3 deposit(s) is not charged as part of the structured transactions in the indictment.

4 Counts One and Two of the Superceding Indictment charge Defendant Wommer with
5 structuring financial transactions in violation of 31 U.S.C. §5324(a)(3). Count Three charges
6 Defendant with the structuring of financial transactions in violation of 31 U.S.C. §5324(a)(1).
7 Count Four charges Defendant with tax evasion by attempting to evade and defeat the payment of
8 \$13,020.20 in interest and penalties owed on his 2007 taxes in violation of 26 U.S.C. §7201.
9 Count Five charges Defendant with falsely stating and verifying on an IRS Form 433-A that he had
10 only \$1,000 in his bank accounts in violation of 26 U.S.C. §7206(1). Although the Government
11 has also argued that Defendant Wommer committed "bankruptcy fraud" by attempting to avoid a
12 levy by the bankruptcy trustee, Mr. Wommer has not been charged with a criminal offense in this
13 regard.

14 **DISCUSSION**

15 Defendant argues that the proposed forfeiture of the entire \$75,700.62 seized from Ms.
16 Lambelet's bank account violates the Eighth Amendment's prohibition against excessive fines. He
17 therefore seeks an order in advance of trial requiring the Government to return the seized funds to
18 him. The Government argues, however, that the entire amount is subject to forfeiture. The
19 Government also argues that Defendant's motion is legally premature and not ripe for decision
20 because a final judgment of forfeiture will not be entered until and unless Defendant is convicted of
21 an offense charged in the indictment which makes the funds subject to forfeiture. Defendant
22 argues, however, that he is entitled to a pre-trial determination of the validity of the seizure of his
23 property.

24 Counts One and Two of the Superceding indictment charge Mr. Wommer with the violation
25 of 31 U.S.C. §5324(a)(3) by structuring financial transactions in order to evade the reporting
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1 requirements in 31 U.S.C. §5313(a).¹ The Superseding Indictment also seeks an *in personam*
2 criminal forfeiture money judgment against Defendant Wommer up to \$75,700.62 pursuant to 31
3 U.S.C. §5317(c)(1)(A) which states as follows:

4 (A) The court in imposing sentence for any violation of section
5 5313, 5316, or 5324 of this title [31 U.S.C. § 5313, 5316, or 5324],
6 or any conspiracy to commit such violation, shall order the defendant
to forfeit all property, real or personal, involved in the offense and
any property traceable thereto.

7 Pursuant to subsection §5317(c)(1)(B), the criminal forfeiture procedures set forth in 21
8 U.S.C. §853 govern criminal forfeitures under this provision.

9 The pre-indictment seizure warrant in this case was issued pursuant to the civil forfeiture
10 provisions in 31 U.S.C. §5317(c)(2). *Response to Motion for Return of Property (#22), Exhibit 1.*
11 That statute states as follows:

12 Any property involved in a violation of section 5313, 5316 or 5324 ...
13 or any conspiracy to commit any such violation, and any property
14 traceable to any such violation or conspiracy, may be seized and
15 forfeited to the United States in accordance with the procedures
governing civil forfeitures in money laundering cases pursuant to
section 981(a)(1)(A) of title 18, United States Code.

16 18 U.S.C. §981(b)(1) authorizes the Government to obtain a warrant for the seizure of
17 property subject to civil forfeiture. Although the funds in Ms. Lambelet's bank account were
18 seized pursuant to the civil forfeiture provisions, by virtue of the indictment the Government now
19 seeks the forfeiture of those funds under the criminal forfeiture provisions in 31 U.S.C.
20 §5317(c)(1).

21 **1. Whether the Defendant's Motion for Return of Seized Property Is Legally**
22 **Premature.**

23 The Court first considers whether it has jurisdiction to entertain Defendant Wommer's
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25 ¹ The Court discussed the application of these statutes to the alleged transactions in Findings
26 & Recommendations (#28), pp. 9-10. It remains the Court's view that the withdrawals from Mr.
27 Wommer's bank accounts and the deposits into Ms. Lambelet's accounts constitute only one
28 alleged structuring offense under 31 U.S.C. Section 5324(a)(3) and should therefore only be
charged in one count. *See Findings & Recommendations (#28) and Order (#36)* (adopting
magistrate judge's findings and recommendations).

1 motion for the return of seized property. In *United States v. Monsanto*, 491 U.S. 600, 109 S.Ct.
2 265 (1989), the Supreme Court held that the criminal forfeiture provisions set forth in 21 U.S.C.
3 Section 853(a) contains no exemption for assets that a defendant may wish to use for payment of
4 attorney's fees in defending against the criminal charges. Citing its decision in *Caplin & Drysdale*
5 *Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646 (1989), the Court also stated that "neither
6 the Fifth or Sixth Amendments to the Constitution requires Congress to permit a defendant to use
7 assets adjudged to be forfeitable to pay that defendant's legal fees." *Id.* 491 U.S. at 614, 109 S.Ct.
8 at 2666. The Court further stated that assets in a defendant's possession may be restrained based on
9 a finding of probable cause to believe that the assets are forfeitable. In so holding, the Court noted
10 that "we have previously permitted the Government to seize property based on a finding of
11 probable cause to believe that the property will ultimately be proven forfeitable. (citations
12 omitted)." *Id.* 491 U.S. at 615, 109 S.Ct. at 2666. The Court declined to decide whether due
13 process requires the district court to conduct an adversarial evidentiary hearing *before* a pretrial
14 restraining order can be imposed.

15 The majority of federal courts of appeal that have addressed the issue hold that the Due
16 Process Clause does not require an adversary hearing *prior* to the issuance of a seizure warrant or a
17 restraining order for purposes of securing property subject to forfeiture. *United States v. Monsanto*,
18 924 F.2d 1186, 1195, 1203 (2nd Cir. 1991); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 419-421
19 (D.C.Cir. 2008). Where the defendant shows that the seized or restrained assets are needed to pay
20 for defense counsel, however, the Fifth and Sixth Amendments require that the district court grant
21 defendant a post-seizure or post-restraint adversary hearing. At such hearing, the government is
22 required to show that there is probable cause to believe (a) that the defendant committed the crime
23 that provides a basis for forfeiture, and (b) that the property specified as forfeitable in the
24 indictment is properly forfeitable. *United States v. Monsanto* and *United States v. E-Gold, Ltd.*,
25 *supra*. See also *United States v. Melrose East Subdivision*, 357 F.3d 493, 499-501 (5th Cir. 2004);
26 and *United States v. Michelle's Lounge*, 39 F.3d 684, 700-701 (7th Cir. 1994).

27 In this case, Defendant Wommer does not challenge the seizure of his funds on the grounds
28 that there is no probable cause to support the structuring charges in the indictment or that the seized

1 funds are not subject to forfeiture under 31 U.S.C. Section 5317(c)(1) or (c)(2). Defendant, instead,
2 argues that forfeiture of the entire \$75,700.62 would violate the Eighth Amendment's prohibition
3 against the imposition of excessive fines.²

4 In *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), the Supreme Court
5 stated that a punitive forfeiture is excessive under the Excessive Fines Clause of the Eighth
6 Amendment if it is "grossly disproportionate to the gravity of the defendant's offense." In
7 determining whether a forfeiture is grossly disproportionate, the Court adopted a four factor test
8 which weighs the gravity of the defendant's offense by (1) the nature and extent of the crime, (2)
9 whether the violation was related to other illegal activities, (3) the other penalties that may be
10 imposed for the violation, and (4) the extent of the harm caused. *Bajakajian*, 52 U.S. at 337, 118
11 S.Ct. at 038-39. See also *United States v. \$100,348.00 In U.S. Currency*, 354 F.3d 1110, 1121-22
12 (9th Cir. 2004).

13 The defendant in *Bajakajian* attempted to leave the United States without reporting that he
14 was transporting currency in excess of \$10,000 as required by 31 U.S.C. §5316. An inspection of
15 defendant's and his family's possessions resulted in the discovery of \$357,144 in currency. The
16 defendant was charged with a reporting violation under §5316(a)(1)(A). He was also charged with
17 making a false statement to the U.S. Customs Service. The indictment sought forfeiture of the
18 entire \$357,144 pursuant to 18 U.S.C. § 982(a)(1). Defendant pled guilty to the reporting violation
19 under § 5316(a)(1)(A), in exchange for the dismissal of the other charge and proceeded to a bench
20 trial on the forfeiture count. The district court found that the entire \$357,144 was subject to
21 forfeiture because it was involved in the offense. The court found, however, that the funds were
22 not connected to any other crime and that the defendant was transporting the money to repay a
23 lawful debt. The district court also found that defendant "had failed to report that he was taking
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26 ² Defendant did not claim in his motion for return of seized property that the funds are
27 needed to pay his attorney's fees. He first raised this assertion in his response to Government's
28 motion to dismiss his motion for return of seized property. *Defendant's Response* (#39), p. 9.
Defendant has not submitted an affidavit showing that he is financially unable to pay retained
counsel without the seized funds.

1 currency out of the United States because of fear stemming from ‘cultural differences’: [defendant]
2 who had grown up as a member of the Armenian minority in Syria had a ‘distrust for the
3 Government.’” 524 U.S. at 326, 118 S.Ct. at 2032. The district court concluded that forfeiture of
4 the entire \$357,144 would violate the Excessive Fines Clause. It therefore ordered the forfeiture of
5 \$15,000 and also imposed a sentence of three years probation and a fine of \$5,000– the maximum
6 fine under the Sentencing Guidelines.

7 The government appealed on the grounds that full forfeiture of the entire \$357,144 was
8 required and warranted under the statute. The defendant did not appeal from the \$15,000 forfeiture
9 judgment. The Supreme Court agreed with the district court that forfeiture of the entire \$357,411
10 would have been excessive. The Court first noted that defendant’s crime was solely a reporting
11 offense and that it would have been permissible for him to transport money out of the country so
12 long as he reported it. The defendant’s violation was unrelated to any other illegal activities. The
13 money was the proceeds of legal activity and was to be used to repay a lawful debt. The Court also
14 stated that “[defendant] does not fit into the class of persons for whom the statute was principally
15 designed: He is not a money launderer, a drug trafficker, or a tax evader.” *Id.* 524 U.S. at 338, 118
16 S.Ct. at 2038. Under the sentencing guidelines, the maximum sentence that could have been
17 imposed on the defendant was 6 months and the maximum fine was \$5,000. The Court stated that
18 these penalties confirmed the minimal level of culpability. The Court also found that the harm that
19 the defendant caused was minimal. The failure to report the currency affected only the
20 government, and only in a relatively minor way. There was no fraud on the government and no loss
21 to the public fisc.

22 In *United States v. \$100,348.00 In U.S. Currency*, 354 F.3d 1110 (9th Cir. 2004), the court
23 affirmed a \$10,000 civil forfeiture judgment pursuant to 31 U.S.C. §5317(c)(2) on facts similar to
24 *Bajakajian*. In that case, an individual named Mayzel told an airport customs inspector that he was
25 carrying only \$5,000 when he was, in fact, carrying \$100,348.00. Another individual, Amiel,
26 subsequently claimed that the \$100,000 belonged to him, that \$90,000 of the funds were the
27 proceeds from the sale of a store, and that he had asked Mayzel to deliver the \$100,000 to his sister
28 in Israel. Mayzel was convicted of making a false statement in violation of 18 U.S.C. § 1001 and

1 was sentenced to 205 days imprisonment and ordered to pay a special assessment of \$100. No fine
2 was imposed based on Mayzel's inability to pay. In affirming the civil forfeiture order, the Ninth
3 Circuit stated that "a forfeiture of \$100,348 would be excessive but that \$10,000 would not be." *Id.*
4 354 F.3d at 1122. As in *Bajakajian*, the court stated that Mayzel's crime was solely a reporting
5 offense and that it would have been lawful for him to take the money out of the country so long as
6 he reported it. There was also credible evidence that the money came from a lawful source.
7 Although no fine was imposed, under the Sentencing Guidelines the maximum fine that could have
8 been imposed on Mayzel was either \$5,000 or \$30,000, depending on whether certain mitigating
9 conditions applied. *Id.* at 1122. The court found that Mayzel's level of culpability was more than
10 minimal. The only harm caused by the offense, however, was that the government would have
11 been deprived of information that \$100,348 left the country. The government did not suffer a
12 financial loss.

13 At the other end of the spectrum, the Second Circuit in *United States v. Castello*, 611 F.3d
14 116 (2nd Cir. 2010), upheld a forfeiture in excess of \$12 million plus the equity in defendant's
15 home. The court stated that the proper amount of the forfeiture under §5317(c)(1)(A), as limited by
16 *Bajakajian*, is the total forfeitable amount required by the statute, discounted by whatever amount
17 is necessary to render the total amount not "grossly disproportional" to the offense of conviction.
18 The defendant in *Castello* operated a check cashing business which cashed over \$200 million in
19 checks over \$10,000. The defendant was convicted of failing to file thousands of currency
20 transaction reports ("CTR's") required under 31 U.S.C. § 5313(a). The forfeiture amount was
21 representative of the fees that the defendant earned from cashing checks for which the required
22 CTRs were not filed. The court stated defendant's reporting violations enabled his customers to
23 commit various acts of fraud and that defendant was the type of person, a money launderer, at
24 whom the reporting statute was aimed. Although the maximum fine under the statute was
25 \$250,000, the court stated that the appropriate sentencing factor to consider under *Bajakajian* is the
26 fine that would apply under the Sentencing Guidelines in the absence of a statutory fine limit. The
27 court noted that the guidelines fine level was many times higher than the statutory maximum. In
28 regard to the harm caused by defendant, the court stated that his "refusal to file CTRs helped his

1 customers evade taxes, cash fictitious checks, and commit securities fraud. The victims included
2 private parties as well as the federal government.” *Id.* 611 F.3d at 124.

3 *Castello* also states that the defendant has the burden of showing that the forfeiture is
4 unconstitutional under the *Bajakajian* factors. *Id.* 611 F.3d at 120, citing *United States v. Jose*, 499
5 F.3d 105 108 (1st Cir. 2007) and *United States v. Ahmad*, 213 F.3d 805, 816 (4th Cir. 2000). In a
6 decision issued shortly before *Bajakajian*, the Ninth Circuit stated that it uses a two-pronged
7 approach for determining whether a forfeiture of property constitutes an excessive fine. *United*
8 *States v. Ladum*, 141 F.3d 1328, 1349 (9th Cir. 1998). First, the government must show that the
9 property was an instrumentality of the crime-that there was a substantial connection between the
10 property and the offense. If the government satisfies the instrumentality prong, the claimant has the
11 burden of showing that the forfeiture is grossly disproportionate given the nature and extent of his
12 criminal culpability.

13 In arguing that Defendant’s motion should be dismissed on jurisdictional grounds, the
14 Government relies on *United States v. Talebnejad*, 460 F.3d 563 (4th Cir. 2006) and district court
15 decisions following its reasoning. The defendants in *Talebnejad* were charged with operating a
16 money transmitting business without a required state license in violation of 18 U.S.C. §1960. The
17 indictment sought the forfeiture of approximately \$18 million in property traceable to the charged
18 offenses. The defendants moved to dismiss the indictment, in part, on the ground that the \$18
19 million forfeiture sought in the indictment violated the Eighth Amendment’s Excessive Fines
20 Clause. The district court declined to address this portion of defendants’ motion on the ground that
21 it was premature. The Fourth Circuit agreed with the district court that the challenge was not ripe.
22 The court cited *United v. Covey*, 232 F.3d 641, 646 (8th Cir. 2000) in which the court stated that it
23 did not have jurisdiction to consider an appeal challenging a forfeiture when no final forfeiture
24 order or judgment had been entered. *Talebnejad*, 460 F.3d at 573.

25 In *United States v. Coutentos*, 2009 WL 3806192, *4 (N.D. Iowa 2009), the indictment
26 charged the defendant with the production of child pornography. The indictment contained a
27 forfeiture allegation, but the decision does not describe the nature of the property sought to be
28 forfeited. Based on *Talebnejad*, the court denied defendant’s motion to dismiss the forfeiture

1 allegation pursuant to the Eighth Amendment on the grounds that it was premature. In *United*
2 *States v. Tedder*, 2003 WL 23204849 (W.D. Wis. 2003), the court denied defendant's Eighth
3 Amendment challenge to a preliminary criminal forfeiture verdict. The court held that
4 defendant's challenge was premature because no forfeiture order had been entered and no final
5 order would be entered until sentencing. The court noted, however, that defendant had virtually
6 no chance of prevailing on his Eighth Amendment argument.

7 This Court agrees that it would be legally premature to entertain a motion to dismiss the
8 forfeiture allegation in the Superseding Indictment on the grounds that it violates the Excessive
9 Fines Clause of the Eighth Amendment. Mr. Wommer will have the opportunity to challenge
10 the amount of the requested forfeiture on Eighth Amendment grounds if he is convicted.
11 *Talebnejad, Covey, Coutentos and Tedder*, however, did not involve motions for the return of
12 seized property allegedly needed for payment of the defendants' attorney's fees. Arguably,
13 where a defendant demonstrates that he needs the seized or restrained funds to pay his defense
14 attorney's fees, he should be able to move for the return or release of seized assets that exceed
15 the maximum amount of any forfeiture that could reasonably be imposed based on the
16 undisputed facts of the case. Neither party has cited any decision that addresses this specific
17 issue, however, and the Court has not found any through its own research.

18 Assuming that the court has jurisdiction to entertain such a motion, the burden should be
19 on the defendant to establish, on the basis of the undisputed facts, the maximum amount of
20 forfeiture that could reasonably be imposed in accordance with the Eighth Amendment's
21 prohibition against excessive fines. See e.g. *United States v. Castello* and *United States v.*
22 *Ladum, supra* (holding that the defendant has the burden of proof on the Eighth Amendment
23 issue). The burden thus imposed should be similar to that on the moving party in a motion for
24 summary judgment in a civil action.

25 In this case, Defendant has not shown that he will be unable to pay his retained counsel
26 unless some portion of the seized funds are released to him. Defendant's counsel recently
27 confirmed to the Court that he will continue as Defendant's counsel. See *Minutes of*
28 *Proceedings (#40), October 20, 2011 Status Conference*. Absent such a showing of financial

1 need, the Court does not have a jurisdictional basis to entertain Defendant's motion. *United*
2 *States v. Monsanto*, 924 F.2d 1186, 1195, 1203 (2nd Cir. 1991) and *United States v. E-Gold,*
3 *Ltd.*, 521 F.3d 411, 419-421 (D.C.Cir. 2008).

4 **2. Whether Forfeiture of the Entire \$75,700.62 or Some Lesser Amount**
5 **is Constitutionally Excessive as a Matter of Law.**

6 Assuming the Court has jurisdiction to entertain Defendant's motion, the next question
7 is whether forfeiture of the \$75,700.62 would be constitutionally excessive as a matter of law.
8 The Court rejects the Government's assertion that the proposed forfeiture of Defendant
9 Wommer's funds is not subject to Eighth Amendment protection because they are the "fruits of
10 the crime" or the proceeds of illegal activity. *See Government's Response to Motion for Return*
11 *of Seized Property (#22), p.10.* The Government relies on *United States v. Real Property*
12 *Located at 22 Santa Barbara Drive*, 264 F.3d 860, 874 (9th Cir. 2001) in which the court held
13 that forfeiture of proceeds of illegal narcotics trafficking cannot be considered punishment, as it
14 is simply parts the owner from the proceeds of criminal activity. Defendant Wommer asserts
15 that the \$75,700.62 was acquired from lawful sources and the Government has provided no
16 information to the contrary. Forfeiture of the \$75,700.62 is sought on the grounds that the
17 funds were involved in Defendant's structuring offense in violation of 31 U.S.C. §5324(a)(3).
18 While such conduct makes the funds subject to forfeiture, it does not make them the *proceeds*
19 of criminal activity. *See Bajakajian, supra.* *United States v. Real Property Located at 22 Santa*
20 *Barbara Drive*, is therefore distinguishable. *See also United States v. Jalaram, Inc.*, 599 F.3d
21 347, 354-55 (4th Cir. 2010) (rejecting the view that forfeiture of proceeds from criminal activity
22 are exempt from an excessive fines analysis under the Eighth Amendment, but also stating that
23 in most cases courts will ultimately find a forfeiture of proceeds from criminal activity to not be
24 grossly disproportional).

25 The Court, however, agrees with the Government's assertion that the nature and extent
26 of Defendant Wommer's alleged illegal conduct is more serious than that in *Bajakajian* or
27 *\$100,348.00 In U.S. Currency*. Defendant Wommer's alleged violations occurred over a period
28 of approximately two weeks during which he made a series of withdrawals from his own

1 accounts and arranged for deposits into Ms. Lambelet's account, all in amounts less than
2 \$10,000. Mr. Wommer allegedly told the IRS special agent that he was familiar with the
3 currency transaction reporting requirements and that he had prosecuted structuring cases
4 himself when he was an Assistant United States Attorney in the 1990s. Mr. Wommer also
5 allegedly made statements indicating that he made the transfers in order to avoid potential levies
6 on his funds by the bankruptcy trustee or the IRS. These allegations indicate a level of intent
7 and willfulness to evade the reporting requirements that was not present in *Bajakajian* or
8 *\$100,348.00 In U.S. Currency*.

9 The second *Bajakajian* factor considers whether the violation was related to other illegal
10 activities. Again, Mr. Wommer allegedly transferred his funds into Ms. Lambelet's bank
11 account to avoid possible levies by the IRS and the bankruptcy court trustee. He has now been
12 charged with tax evasion and making a false statement on an IRS form as part of an attempt to
13 prevent the IRS from collecting the \$13,020 in penalties and interest owed on his 2007 taxes.
14 Although not charged as a criminal offense, Mr. Wommer also allegedly sought to prevent the
15 bankruptcy trustee from recovering the \$18,000 loan repayment which the trustee apparently
16 claimed was a preferential transfer. While these alleged offenses or acts have yet to be proven,
17 Defendant's alleged violation of §5324(a)(1) and (3) constitutes a more serious offense than
18 that in *Bajakajian* because of its alleged connection to other alleged criminal or fraudulent
19 activity.

20 A person convicted of violating §5324(a) shall be imprisoned for not more than five
21 years or fined more than \$250,000. *See* 31 U.S.C. §5324(d)(1) and 18 U.S.C. §3571(b)(3). The
22 Government argues that if Mr. Wommer is convicted under §5324(a), he faces a prison sentence
23 under the United States Sentencing Guidelines of between 33 and 41 months and a fine in the
24 range of \$7,500 to \$75,000. *See Government's Response to Motion for Return of Seized*
25 *Property* (#22), pp. 14-15. Because Mr. Wommer could be fined as much as \$75,000 under the
26 Sentencing Guidelines, the Government argues that a forfeiture in the comparable amount of
27 \$75,700.62 is presumptively constitutional. *See United States v. Wallace*, 398 F.3d 483, 486
28 (5th Cir. 2004) and *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309 (11th Cir. 1999).

1 *See also United States v. Grossi*, 359 Fed.Appx. 830, 2009 WL 4913587 (C.A.9 (Cal.)
2 (unpublished decision relying on *Wallace* and 817 N.E. 29th Drive.). The Government also
3 argues that even if the fine is at the low range of \$7,500, a forfeiture in an amount roughly ten
4 times greater is not necessarily constitutionally excessive based on a consideration of all the
5 *Bajakajian* factors. *See United States v. Cheeseman*, 600 F.3d 270, 284-85 (3rd Cir. 2010).
6 *Cheeseman* also states that the court may consider the statutory maximum fine in deciding
7 whether the forfeiture amount is excessive. In this case, the statutory maximum fine is
8 \$250,000 which is more than three times the amount of forfeiture sought by the Government.

9 The fourth factor listed in *Bajakajian* considers the extent of harm caused by the
10 violation of the currency reporting statute. This is not a case like *Bajakajian* that, on its face,
11 involved no financial harm to the government or third persons. Mr. Wommer's alleged
12 violations have potentially caused financial loss to the United States through Mr. Wommer's
13 alleged effort to avoid payment of the penalties and interest assessed against him by the IRS.
14 His alleged efforts to avoid a levy on his accounts by the bankruptcy trustee has also potentially
15 caused financial loss to the subject debtor's bankruptcy estate and the creditors thereof.

16 Defendant Wommer did not address any of the Government's arguments regarding the
17 *Bajakajian* factors in his reply brief. *See Defendant's Reply* (#23). He, instead, argues that his
18 alleged conduct presents exactly the same situation as *Bajakajian*. *Id.* p. 4. As the foregoing
19 discussion indicates, however, this case is not the same as *Bajakajian*. Defendant also appears
20 to argue that the Government has the burden of showing that the forfeiture of the entire amount
21 is not excessive under the Eighth Amendment. *Defendant's Response to Government's Motion*
22 *to Dismiss* (#29). Defendant, however, has the burden of proof on this issue in the forfeiture
23 proceeding, and to the extent that the Court has jurisdiction to entertain the instant motion, it is
24 Defendant's burden to show that there is no reasonable basis upon which forfeiture above a
25 certain amount could be justified under the Eighth Amendment. Defendant has not done so.
26 Although it is not the Government's burden to do so, the Court also finds that it has presented a
27 reasonable factual basis upon which the District Court could find that forfeiture of the entire
28 \$75,700.62 does not violate the Eighth Amendment's prohibition against excessive fines. The

1 Court, however, makes no conclusion, at this stage, as to the amount of forfeiture that should
2 ultimately be ordered if Defendant is convicted.

3 **CONCLUSION**

4 Defendant has not made the necessary showing that he needs the seized funds in order to
5 continue to be represented by his retained counsel. The Court therefore lacks jurisdiction to
6 entertain Defendant's motion for return of the seized property pursuant to the Fifth and Sixth
7 Amendments. To the extent that jurisdiction exists, however, it is Defendant's burden to
8 demonstrate, as a matter of law, that forfeiture of some or all of the seized funds constitutes an
9 excessive fine under the Eighth Amendment as a matter of law. Defendant has not met his
10 burden in that regard. Accordingly,

11 **IT IS HEREBY ORDERED** that Defendant Paul Wommer's Motion for Return of
12 Seized Property (#14) is **denied**.

13 **IT IS FURTHER ORDERED** that the Government's Motion to Dismiss Wommer's
14 Motion for Return of Seized Property (#26) is **denied**, without prejudice, on the grounds that it
15 is **moot**.

16 DATED this 27th day of October, 2011.

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19 GEORGE FOLEY, JR.
20 United States Magistrate Judge
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